Supreme Court, U.S.
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No. 99 341

In The

Supreme Court of the United States

SIGNET BANK/VIRGINIA, a Virginia corporation, CAPITAL ONE BANK, a Virginia corporation, and DOES 2-100,

Petitioners,

vs.

WILLIAM YU and DARLENE YU, individually and on behalf of others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Full Faith and Credit Clause permits California to approve a private tort action for damages based on its resident debtors' collateral attack on a sister State's final judgment?

2. Whether the judicial recognition of California credit card debtors as a favored class of defendants, presumptively entitled to elevated protection under concepts of "minimum contacts," violates this Court's well-established personal jurisdiction doctrines?

PARTIES

The parties are Petitioners Signet Bank/Virginia and Capital One Bank (collectively the "Banks") and Respondents William Yu and Darlene Yu (the "Yus"). Pursuant to Rule 29.6, Petitioner Capital One Bank states that it is a wholly owned subsidiary of Capital One Financial Corporation. Petitioner Signet Bank/Virginia no longer exists as a separate corporate entity, its successor having merged into First Union Corporation in November 1997.

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OPINIONS BELOW

The opinion of the California Court of Appeal (App. 1-30) is reported at 69 Cal. App. 4th 1377, 82 Cal. Rptr. 2d 304 (1999). The trial court's order (App. 6-7) is unpublished. The unpublished order denying rehearing is annexed hereto at App. 31. The California Supreme Court's unpublished May 26, 1999 order denying review is annexed hereto at App. 32.

JURISDICTION

The judgment of the court of appeal was entered on February 16, 1999. (App. at 1.) The court of appeal denied the Banks' petition for rehearing on March 16, 1999. (App. at 31.) The California Supreme Court denied the Banks' petition for review on May 26, 1999. (App. at 32.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article 4, section 1 of the U.S. Constitution provides:

> Full faith and Credit shall be given in each State to the public acts, Records and judicial Proceedings of every other State.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia's long-arm statute, Va. Code Ann. section 8.01-328.1(A), in relevant part, provides:

> A court may exercise personal jurisdiction over a person, who acts, directly or by an agent, as to a cause of action arising from the person's . . . [t]ransacting any business in this Commonwealth.

California Business & Professions Code section 17200, in relevant part, provides:

> [U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice.

STATEMENT OF THE CASE

Capital One is a Virginia limited purpose credit card bank that was created when Signet Bank/Virginia spun off most of its credit card division in November 1994. At all relevant times each petitioner maintained its principal place of business in Virginia. The Yus are California residents.

The Yus signed a credit card agreement with Signet in May 1989, promising to pay Signet for all debt that they incurred. The agreement provided that it would not become effective until accepted by Signet in Virginia, that

the Yus' payments were due in Virginia, and that the agreement was governed by Virginia law.

After using their credit cards for a number of years and making payments to Signet in Virginia, the Yus defaulted in 1991, owing Signet approximately $2,200. Signet notified the Yus of the default, asked them for payment, notified them that it intended to sue for the unpaid balance in Virginia, and gave them the option of requesting that suit be brought in California. The Yus ignored the notices and did not request suit in California.

Signet served the Yus with the Virginia equivalent of a civil summons and complaint on July 9, 1994, for their debt plus interest at the contract rate and court costs. The Yus failed to appear and defend or to respond in any way. On August 9, 1994, the Virginia court entered judgment against them for approximately $4,000.

Pursuant to Virginia procedural rules, Signet caused a garnishment summons to be issued by the Virginia court and served upon the Virginia office of Mr. Yu's employer. Signet sent a copy of the garnishment summons to Mr. Yu in California at his home and at his office. He did not challenge the issuance or execution of the garnishment summons. Mr. Yu's employer withheld wages sufficient to satisfy the judgment.

In June 1995, almost one year after the judgment had been entered and months after it had been satisfied, the Yus brought an action in a California superior court seeking compensatory and punitive damages for having been subjected to suit in Virginia. The premise of each of their multiple causes of action was that certain California statutes applied to judicial proceedings in Virginia and that

California provides the exclusive forum in which California consumers can be sued or in which sister State judgments can be enforced against them. The Yus also sought to recover on the asserted ground that the Banks had violated their due process rights by suing them in Virginia.

On December 13, 1996, the Banks moved for summary judgment as to each of the claims on the grounds, *inter alia*, that the Yus' suit was a collateral attack on a final judgment of a sister State that was impermissible under the Full Faith and Credit Clause. The trial court granted summary judgment to the Banks. (App. at 6-7.)

On February 16, 1999, the California Court of Appeal entered judgment reversing the trial court with respect to the Yus' causes of action for abuse of process and for alleged unlawful business practices under California Business and Professions Code section 17200 *et seq.* The court held that California resident debtors could collaterally attack Virginia's final judgment against them for lack of personal jurisdiction because they were "unwitting customers" who "had no relationship with Virginia other than their credit card, and it was fundamentally unfair to expect them to travel thousands of miles to litigate matters concerning their account." (App. at 13.)[1]

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[1] The court added that *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), "thus supports our conclusion . . . that the Virginia judgments against respondents' distant out-of-state cardholders were in excess of jurisdiction." (App. at 13.)

According to the court of appeal, the making of the contract in Virginia, the extension of revolving credit from Virginia for a period of several years, payments made in Virginia to their creditor, and the choice of Virginia law in their credit card agreement did not constitute sufficient contacts with Virginia to enable courts of Virginia to assert personal jurisdiction over the Yus with respect to a dispute arising from that contract.

REASONS FOR GRANTING THE WRIT

The extension of credit by banks to private customers through the use of credit cards is a multi-billion-dollar transnational and international business. Credit card contracts create obligations enforceable by courts. Stability of judgments enforcing such contractual obligations is of vital importance not only to the citizens whose rights have been adjudicated, but also to the economic stability of the Nation. As the most populous State in the Union, California has millions of residents using credit cards issued by out-of-state banks and credit card companies. The decision below destabilizes the mechanisms for enforcing credit card and other contracts, and sets at war the courts of one State against another, in violation of fundamental principles of our constitutional government.

The success of the Yus in collaterally attacking the Virginia judgment in a tort action for damages will predictably lead to quantities of litigation that will further destabilize sister State judgments, unless this Court grants *certiorari* to stem the flow and to bring California back into the full faith and credit fold. Such offensive

attacks lead to interstate sniping and retaliation that offends comity, State sovereignty, and interstate commerce in a way that the Full Faith and Credit Clause was designed to avoid. An example of such an unfortunate attack is the court of appeal's statement: "[The Banks] cannot escape liability for distant forum abuse simply because they managed to persuade some local [Virginia] judges to go along with their scheme." (App. at 17.)[2]

The refusal by the court of appeal to respect the final judgment of the Virginia court that had exercised personal jurisdiction over the Yus pursuant to Virginia's long-arm statute is also likely to have profound national consequences. That statute has been consistently interpreted to permit the exercise of personal jurisdiction to the full extent permitted by the Due Process Clause, by both the Fourth Circuit (*Brown v. ABC*, 704 F.2d 1296, 1300-02 (4th Cir. 1983)), and the State courts of Virginia (*John G. Kolbe, Inc. v. Chromoderm Chair Co.*, 211 Va. 736, 180 S.E.2d 664, 667 (1971) (the long-arm statute requires only a single purposeful transaction to confer jurisdiction)).

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[2] History teaches that the courts of Virginia will not take kindly to the California court's untoward statement or its decision. *See Kessler v. Fauquier Nat'l Bank*, 195 Va. 1095, 81 S.E. 2d 440, 442, 445 (1954) (refusing to accord full faith and credit to a Florida judgment issued by a court that had refused to accord full faith and credit to a prior Virginia judgment).

A. The Court of Appeal's Approval of a Private Tort Action for Damages Based on its Resident Debtor's Collateral Attack on a Sister State's Final Judgment Represents an Unprecedented and Serious Threat to Fundamental Full Faith and Credit Principles.

A court asked to aid in the enforcement of a sister State's judgment may conduct a limited inquiry into the jurisdiction of the rendering court. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins.*, 455 U.S. 691, 704-05 n.10 (1982) ("[r]efusal to enforce judgment rendered in another State when the judgment is void for lack of jurisdiction merely gives to that judgment the same 'credit, validity, and effect' that it would receive in a court of the rendering State").[3]

When a non-rendering State is asked to enforce the judicial act of another State, the State's dual role in the federal system are implicated. The non-rendering State must assure itself that the due process requirements of the Federal Constitution have been observed and, at the same time, protect its sovereignty by refusing to lend its aid to the enforcement of judicial acts that do not meet the constitutional requisites. *See, e.g., Nevada v. Hall*, 440 U.S. 410, 422-23 (1979).

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[3] In other settings, California courts have adhered strictly to that limitation. *See, e.g., Washoe Dev. Co. v. Irving Sav. Ass'n*, 47 Cal. App. 4th 1518, 1521 (1996) ("upon a claim that a foreign judgment is not entitled to full faith and credit, the permissible scope of inquiry is limited to a determination of whether the court of forum had fundamental jurisdiction") (citation omitted).

The issue presented here is very different: Does the Full Faith and Credit Clause bar a California court from undertaking *de novo* review of the jurisdictional bases underlying a final and completely executed Virginia judgment for the purpose of awarding damages to resident plaintiffs against non-resident defendants? Exhaustive research has not revealed a single published decision, State or Federal, that has heretofore approved a collateral attack on a sister State's final judgment as a basis for a private tort action for damages.[4]

The court of appeal nonetheless concluded that a decision of the California Supreme Court, *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94 (1972), holding that the filing of an action in the wrong county within California constituted an abuse of process under California law, could be applied across State lines to create an abuse of process action in California against Signet, thereby extending intrastate law into interstate law. (App. at

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[4] Nor is there support in the literature for making State courts generally available for attacks on the jurisdiction of other States. Rather, commentators and scholars agree that lack of jurisdiction is nothing more than an affirmative defense to an enforcement action. *See Restatement (Second) of Conflicts of Laws: Judgments, Topic 4: Defenses to Recognition and Enforcement*, § 105 at 316 (1971) (judgment rendered without jurisdiction "will not be recognized or enforced"); Dan B. Dobbs, *Law of Remedies*, § 2.7 at 179 (2d ed. 1993) (an order void for want of jurisdiction "may be attacked collaterally *by resisting its enforcement* in subsequent judicial proceedings") (emphasis added); Eugene F. Scoles and Peter Hay, *Conflict of Laws*, § 24.14 at 973 (2d ed. 1992) (listing lack of jurisdiction of the rendering court *as a defense to claim* on sister State judgments); E.E. Cheetham *et al.*, *Conflict of Laws* (5th ed. 1962) (including lack of personal jurisdiction among *defenses to the enforcement* of judgments).

14-23.) The assumed elasticity of California law is non-existent. The California Supreme Court's decision involved only the regulation of litigants' access to State courts within California. The court of appeals' decision purports to regulate creditors' access to the courts of the Nation, at least as far as California borrowers are concerned. The court of appeal's decision, therefore, exceeded its power under the Constitution.

The court of appeal summarily disposed of the Banks' constitutional analysis by stating that "there is no authority supporting [the Banks'] proposed limitation on jurisdictional challenges to sister state judgments." (App. at 9; *see also* App. at 21 ("There is no authority under the Full Faith and Credit clause for this proposed limitation on sister states' ability to examine each other's jurisdiction to render a judgment").)

Contrary to the court of appeal, the Full Faith and Credit Clause does impose limitations upon its authority to review the final judgments of sister States. As this Court teaches in *Baker v. General Motors Corp.*, 522 U.S. 222 (1998), the

> animating purpose of the full faith and credit command . . . was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations under the laws or by the judicial proceedings of the others, and to make integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as a right . . . .

Id. at 232 (citation omitted).

The court of appeal's decision that there is no impediment to such suits arrogates to California courts a constitutionally prohibited role. It has sustained a collateral attack on a Virginia final judgment under circumstances in which a collateral attack would not be permitted in California with respect to its own judgments. The Yus did not assert any defense to the Virginia action or to the Virginia enforcement proceedings. Nor did they assert a direct or collateral attack on the judgment in Virginia. The whole substance of their California action is an attack on Virginia's assertion of personal jurisdiction over them.[5] The refusal of California courts to honor judgments of sister States valid in those States seriously offends these fundamental principles underlying the Full Faith and Credit Clause.

B. The Court of Appeal's Recognition of California Credit Card Debtors as a Favored Class of Defendants, Presumptively Entitled to Elevated Protection Under Concepts of "Minimum Contacts," Violates this Court's Well-Established Personal Jurisdiction Doctrines.

The court of appeal concluded that the Yus, as credit card debtors, were "plainly in the class of 'unwitting

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[5] The fact that the court of appeal's decision purports to impose liability on private actors for an alleged due process violation by Virginia ignores the well-established requirement of State action. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (the Due Process Clause "erects no shield against merely private conduct, however discriminatory or wrongful").

customers,' " (App. at 13), entitled to elevated due process protections under concepts of minimum contacts established by this Court. This Court, however, has never countenanced elevation of minimum contacts to protect a favored class of defendants. Whether a particular exercise of personal jurisdiction does or does not "offend 'traditional notices of fair play and substantial justice' " involves an analysis of multiple factors:

> [T]he burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-93 (1980) (citations omitted). *Accord, Burger King*, 471 U.S. at 485-86; *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

The minimum contacts analysis serves to apprise a potential defendant that certain activity may subject that person to the jurisdiction of a foreign State.

> Where [the] forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposely directed" his activities at residents of the forum [ ], and the litigation results from alleged injuries that "arise out of or relate to" those activities.

Burger King, 471 U.S. at 472 (citations omitted). Relying erroneously on dicta from *Burger King*, 471 U.S. at 462, (App. at 13), the decision below contradicts these due process principles which have been carefully developed by this Court from *Pennoyer v. Neff*, 5 Otto [95 U.S.] 714 (1878), to the present.

The Yus' contacts with Virginia were purposely directed at Virginia over a several year period. They sought an open-ended extension of credit from a Virginia resident, used the Virginia resident to reimburse merchants from whom the Yus purchased goods and services, obtained cash advances directly from that Virginia resident, and made payments to the Virginia resident. *Burger King* expressly included persons like the Yus as purposely availing themselves of the benefits and protections of Virginia law. As credit card borrowers for a period of several years, their situation did not remotely resemble that of the one-time mail order purchaser about whom the Eleventh Circuit had expressed concern. The Yus' contract with Signet was not "a simple consumer transaction." (App. at 12.) The relationship of the Yus with Signet under an open-ended agreement for the extension of credit was characterized by a protracted pattern of repeated contacts involving thousands of dollars; it is not the equivalent of a one-shot mail-order purchaser of a kitchen gadget.

This Court has never countenanced a jurisdictional analysis based on the parties' relative size and wealth. On the contrary, "a defendant who has purposely derived commercial benefit from his affiliations in a forum may

not defeat jurisdiction there simply because of his adversary's greater net wealth." *Burger King*, 471 U.S. at 483 n.25.

The court of appeal's statement that "it was fundamentally unfair to expect [the Yus] to travel thousands of miles to litigate matters concerning their account" (App. at 13) is plainly wrong. The Yus were neither required nor expected to travel to Virginia. They needed only either to respond to Signet's offer to change the forum to California from Virginia, or to place a phone call to retain a lawyer in Virginia to defend the $4,000 lawsuit. They did neither. Before jurisdiction can be found to be unreasonable, a court must consider whether considerations of fairness "may be accommodated through means short of finding jurisdiction unconstitutional." 471 U.S. at 477. Because the right to change venue is constitutionally adequate to find the exercise of jurisdiction "reasonable," *id.* at 477-78, the undisputed ability of the Yus to change forums by a simple response cannot be "so gravely difficult and inconvenient" that they suffered a "severe disadvantage." *Id.* at 478.[6]

The court of appeal's complete disregard of the choice-of-law provision selecting Virginia is also irreconcilable with this Court's insistence that such provisions be given weight in the due process analysis. *Burger King*, 471 U.S. at 482.

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[6] The court of appeal's emphasis on the Yus' lack of physical presence in Virginia overlooks the fact that this Court has made clear that such physical presence is no longer necessary. *Burger King*, 471 U.S. at 476.

The decision below reverses this Court's easing of "[t]he limits imposed on state jurisdiction by the Due Process Clause [ ] in its role as a guarantor against inconvenient litigation" in recognition of the dramatic increase in interstate commercial transactions and modern transportation and communication. *World-Wide Volkswagen*, 444 U.S. at 292-93. In the twenty years since that decision, the Nation has experienced an explosion of interstate and international commerce by persons outside the borders of the States in which they reside to procure goods and services from afar – by mail, by telephone, by fax and, more recently, by the Internet. The court of appeal's decision grants credit card debtors in this modern commercial environment constitutionally unwarranted protections against valid claims for payment which should not be sanctioned by this Court.

CONCLUSION

For the foregoing reasons, Petitioners Signet Bank/Virginia and Capital One Bank respectfully pray that this petition for *certiorari* be granted.

Dated: August 24, 1999

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

WILLIAM YU et al., Plaintiffs and Appellants, v. SIGNET BANK/VIRGINIA et al., Defendants and Respondents.	A077911 (Alameda County Super. Ct. No. H-1846748)

Appellants William and Darlene Yu filed this action individually and on behalf of others similarly situated against respondents Signet Bank/Virginia and Capital One Bank challenging respondents' debt collection practices with respect to credit cards they issued to California residents. This appeal arises from the judgment entered for respondents after their motion for summary judgment was granted. We reverse the judgment as to appellants' abuse of process and unlawful business practice claims, and affirm as to the other causes of action.

I. BACKGROUND

Respondents are Virginia corporations with their principal places of business in Virginia. Appellants lived in Fremont, California during the events at issue in this lawsuit.

In 1989, appellants accepted a Signet credit card in response to a pre-approved solicitation they received in the mail. When they signed up for the credit card, appellants executed a certificate accepting terms and conditions which provided that payments on the card would be made to a Virginia address, and that the credit agreement would be governed by Virginia and federal law.

Appellants used the credit card to purchase goods and services primarily for personal, family and household purposes. They never went to Virginia or used the credit card in Virginia. They failed to make payments owed on the card in 1990, and the account was declared delinquent.

Signet had what it called a "long-arm program" for dealing with out-of-state debtors who defaulted on their credit cards. This "long-arm program" was to file collection suits in Virginia state district trial courts against cardholders from other states. The "long-arm program" was begun by Signet around 1983 and carried on by Capital One from March of 1995, after a "spin-off" of Signet's credit card operations to Capital One [sic] More than 90 percent of respondents' long arm suits resulted in default judgments against the cardholders.

When a Virginia suit was filed, respondents sent what they called a "change of jurisdiction" letter to the

out-of-state cardholder. The letter advised the cardholder that "[w]e intend to file suit against you in Virginia," and that "[i]f you would prefer the trial to be in your state, we must receive written notice from you within twenty-one days of this letter." If the cardholder requested a change of jurisdiction within the specified time limit, then the Virginia action would be dismissed. Out-of state cardholders who indicated that they could not appear in court for "lack of money; too far to travel; etc." were not considered to have made a valid request for change of jurisdiction, and the Virginia suits would proceed against those customers.

One of respondents' criteria for determining whether a long-arm suit would be filed was whether the cardholder had a "garnishable place of employment." If the cardholder's employer had an office in Virginia, then respondents would serve a post-judgment wage garnishment order on the employer in Virginia.

Respondents' collection guidelines listed "[p]eople in the limelight, celebrities, attorneys" among the cardholders who were "Not candidates for Legal Action." In his deposition, a Capital One vice-president testified that suing out-of-state attorneys was regarded as "a bad business decision." With respect to "celebrities," the officer said that "we didn't want to expose the company to any press because we hadn't done everything we needed to do." A document produced in connection with the officer's deposition listed "Class Action Risk" among the "Real & Assumed Cost[s]" of the long-arm program in 1994. "Signet needs to realize the potential risk of a class action suit," the document stated, "and do the right thing in order to prevent a future loss to the bank."

Appellants did not hear from Signet for four years, but began receiving collection notices on the account in mid-1994. It is disputed whether appellants received a "change of jurisdiction" letter advising that Signet intended to sue them in Virginia.

Around August of 1994, appellants received a document in the mail entitled "Warrant In Debt," stating that they owed Signet $2,191.38, plus interest at the rate of 19.8 percent from March of 1991. The Warrant In Debt had been filed in the state district court in Richmond, Virginia, and was the equivalent of a California civil summons and complaint. Signet had served the Warrant In Debt on appellants, as non-residents of Virginia, by lodging it with the Secretary of the Commonwealth of Virginia. The back of the document advised defendants that they could "move to object to venue" by filing a written request to have the case moved to a different "general district court." Appellants have testified that they did not understand the nature or legal effect of the Warrant In Debt.

Signet obtained a default judgment against appellants in the Richmond district court on August 9, 1994, and a "garnishment summons" from that court in October 1994. Signet served the garnishment summons on the Hampton, Virginia office of appellant William Yu's employer, Silicon Graphics. An instruction on the form directed that it be forwarded to Silicon Graphics' office in Mountain View, California where Mr. Yu worked. From November 1994 to May 1995, a total of approximately $3,900 were garnished from Mr. Yu's wages in Mountain View.

Appellants filed their class action suit against respondents herein in July of 1995. Their second amended complaint asserted eight causes of action, for: (1) tortious violation of Code of Civil Procedure section 395, subdivision (b), which specifies the venue for actions on consumer contracts; (2) abuse of process; (3) tortious violation of Code of Civil Procedure sections 1710.10 et seq. and 1913, subdivision (a), which establish the procedure for enforcing foreign judgments; (4) violation of due process; (5) restitution and injunctive relief under Business and Professions Code section 17200 for an unlawful, unfair or fraudulent business practice; (6) violation of Civil Code section 1788.15, which outlaws certain consumer debt collection practices; (7) negligent infliction of emotional distress; and (8) intentional infliction of emotional distress.

Shortly after this class action was filed Capital One ended the "long arm program." Capital One's "Risk Operations" department wrote a memorandum dated November 22, 1995, to the collections staff, stating that "[t]he Bank will no longer file nor threaten to file long-arm lawsuits. . . . If the Bank decides to take legal action against a debtor, we will file suit in the Court whose jurisdiction and venue are appropriate to that debtor's domicile. . . . [¶] The Bank will not garnish property in any case where the Bank holds a long-arm judgment against a debtor. If the Bank has obtained a judgment against a debtor in the Court whose jurisdiction and venue are appropriate to the debtor's domicile, we will only garnish property in or through that Court."

Respondents moved for summary judgment or summary adjudication in December 1996, and the motion for

summary judgment was granted in February 1997. The court adopted in full respondents' proposed order granting the motion for summary judgment, adding the words we have placed in italics:

"1. The Court holds as a matter of law that Plaintiffs state no cause of action against Defendants. Defendants obtained and enforced a judgment in Virginia in accordance with Virginia laws *and the Commonwealth of Virginia had personal jurisdiction over the defendants* (sic [the court presumably meant to say "plaintiffs," because Virginia's jurisdiction over the defendant banks was not at issue]). It is irrelevant that Defendants did not domesticate the Virginia judgment in California pursuant to Code of Civil Procedure § 1913 and the Sister State Money Judgment Act, Code of Civil Procedure § 1710, et seq., because Defendants did not attempt to garnish Plaintiff's wages in California. The situs of Plaintiff's debt for garnishment purposes was not only California, the state of Plaintiff's residence, but also Virginia, the state in which his employer Silicon Graphics – the garnishee – could be found. State of Oregon v. Control Data Corp. (Or. 1986) 713 P.2d 30, 32. The proper forum to address Plaintiffs' jurisdictional challenges is *the appellate courts of the Commonwealth of* Virginia, not this Court.

"2. Plaintiffs as a matter of law are not entitled to seek affirmative relief against Defendants for failure to comply with Code of Civil Procedure § 1913 and the Sister State Money Judgment Act, Code of Civil Procedure § 1710, et seq. Defendants may not be held liable under California law for conduct in Virginia that is legal under Virginia law, regardless of whether that same conduct would or would not be legal under California law.

(World Wide Imports v. Bartel (1983) 145 Cal.App.3d 1006.)

"3. *Causes of action for emotional distress do not lie for economic losses.*"

The court entered judgment for respondents, and did not rule on a pending motion for class certification. The class certification motion was supported by evidence that, during the proposed class period from July 15, 1991, respondents had obtained at least 7,575 judgments in Virginia courts against 8,812 California residents, and collected at least $3.5 million on those accounts.

II. DISCUSSION

A. Jurisdiction of the Virginia Court

The threshold issues in this appeal concern the jurisdiction of the Virginia state district court over appellants in Signet's collection action. The grant of summary judgment rested largely on two conclusions: (1) that the Virginia court had personal jurisdiction over appellants; and (2) that appellants could not properly raise the jurisdictional issue except in a Virginia court. These conclusions are contradictory: if the issue of jurisdiction could only be addressed in Virginia, then the court's finding on the point was improper and unnecessary. In any event, however, if these conclusions are incorrect then most of the summary judgment cannot be upheld on its stated grounds.

A judgment of a court lacking personal jurisdiction is a violation of due process, and it is null and void everywhere, including the state in which it is rendered. (*Burnham* v. *Superior Court* (1990) 495 U.S. 604, 609; *Underwriters Nat'l. Assur.* v. *N.C. Life & Acc.* (1982) 455 U.S. 691, 705, fn. 10; *World Wide Volkswagen Corp.* v. *Woodson* (1980) 444 U.S. 286, 291; *Pennoyer* v. *Neff* (1877) 95 U.S. 714, 732.) Thus, if the Virginia state district court did not have personal jurisdiction over appellants, the default judgment was void, and the Virginia "garnishment summons" predicated on that judgment was void as well, regardless of the "situs" of appellants' debt for garnishment purposes. Respondents' defense and the court's apparent finding that respondents' conduct was "legal under Virginia law" also hinged on the validity of the default judgment. If the Virginia judgment was a nullity then that defense and that finding would be insupportable.

Respondents submit that any inquiry into the Virginia court's jurisdiction would be improper.[1] However, respondents have placed that court's jurisdiction in issue by arguing that we are bound to give its judgment full faith and credit. It is settled that a judgment is not entitled to full faith and credit unless the rendering court had jurisdiction to render the judgment. (*Underwriters Nat'l. Assur.* v. *N.C. Life & Acc., supra,* 455 U.S. at p. 704; *Washoe Development Co.* v. *Guaranty Federal Bank* (1996) 47 Cal.App.4th 1518, 1521.) "Consequently, before a court is bound by the judgment rendered in another State, it may

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[1] Respondents' related contention that appellants cannot challenge the Virginia court's jurisdiction in order to obtain "affirmative relief" is discussed below.

inquire into the jurisdictional basis of the foreign court's decree." (*Underwriters Nat'l. Assur.* v. *N.C. Life & Acc., supra,* 455 U.S. at p. 705.) We may therefore address the jurisdictional issue.

Respondents argued to the trial court that appellants were precluded from challenging the Virginia court's jurisdiction because they "slept on their rights," and "knowingly ignored every opportunity they had to make a timely objection to the pre-judgment proceedings." However, "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." (*Ins. Corp. of Ireland* v. *Compagnie Des Bauxites* (1982) 456 U.S. 694, 706.) Appellants did not waive their jurisdictional objection by failing to respond to Signet's "change of jurisdiction" letter or ask the Virginia court for a change of venue, and respondents appear to have abandoned their waiver argument on appeal.

Respondents note that California does not have authority to vacate the judgment of a sister state, even one that is void, and they contend that a foreign court's jurisdiction cannot be considered unless enforcement of the judgment is sought. However, appellants are not seeking to vacate the Virginia judgment, and there is no authority supporting respondents' proposed limitation on jurisdictional challenges to sister state judgments. As Virginia's own Supreme Court has observed, " 'if a judgment is void, it may be assailed anywhere, at any time, in any way, by anybody.' " (*Slaughter* v. *Commonwealth of Virginia* (Va. 1981) 284 S.E.2d 824, 827.) Whenever a foreign judgment is raised as a defense, the court in the subsequent

case can consider whether the court that rendered the judgment had the jurisdiction to do so. (See, e.g., *Underwriters Nat'l. Assur.* v. *N.C. Life & Acc., supra,* 455 U.S. at pp. 701-714.)

The jurisdictional issue thus presented with respect to respondents' "long arm program" was resolved against them in *Signet Bank/Virginia* v. *Tillis* (Ga. Ct. App. 1990) 396 S.E.2d 54. In that case, Signet obtained a default judgment in Virginia against a Georgia cardholder, and sought to enforce the judgment in Georgia. The operative facts in *Tillis* were identical to those in appellants' case. The cardholder had no contacts with Virginia other than returning Signet's pre-approved solicitation to that state, receiving extensions of credit from that state, and mailing payments to that state. The Georgia Court of Appeals found those contacts insufficient under *Burger King Corp.* v. *Rudzewicz* (1985) 471 U.S. 462, and other cases to give the Virginia court personal jurisdiction over the cardholder. The court noted that " '[w]here the nonresident defendant, like the purchaser from a 'mail order house,' is truly the passive party, courts have ordinarily refused to recognize jurisdiction.' " (*Signet Bank/Virginia* v. *Tillis, supra,* 396 S.E.2d at p. 56, quoting *Money-Line, Inc.* v. *Cunningham* (N.Y. App. 1981) 437 N.Y.S.2d 816, 819.)

Tillis reached the correct conclusion under well-established principles. As a matter of due process, personal jurisdiction over a defendant who is outside the forum requires that "he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (*International Shoe Co.* v. *State of Washington*

(1945) 326 U.S. 310, 316.) It must appear that such defendant has " 'purposefully directed' his activities at residents of the forum" (*Burger King Corp.* v. *Rudzewicz, supra,* 471 U.S. at p. 472) " 'such that he should reasonably anticipate being haled into court there' " (*id.* at p. 474). With respect to interstate contracts, "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' " are subject to the latter state's jurisdiction. (*Id.* at p. 473; see, e.g., *Vons Companies, Inc.* v. *Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 453 [upholding jurisdiction over defendants who "sought out and maintained a continuing commercial connection with a California business"].) However, a contract with an out-of-state party does not alone automatically confer jurisdiction on the other party's home forum. (*Burger King Corp.* v. *Rudzewicz, supra,* 471 U.S. at p. 478.) " 'Fortuitous,' or 'attenuated' " contacts with the forum are insufficient (*id.* at p. 475), and "jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent" (*id.* at p. 478).

Burger King found that a Florida court had personal jurisdiction over a Michigan franchisee in a suit by a Florida franchisor arising from their franchise agreement. The opinion noted that the franchisee was an " 'experienced and sophisticated' " businessperson, who had been represented by counsel during the months of negotiations that led to the franchise agreement. (*Burger King Corp.* v. *Rudzewicz, supra,* 471 U.S. at pp. 484-485.) "Eschewing the option of operating an independent local enterprise, [the franchisee] deliberately 'reached out beyond' Michigan

and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization." (*Id.* at pp. 479-80.) The franchise agreement involved "complex transactions" (*id.* at p. 485), and was "a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida" (*id.* at p. 480). A choice-of-law provision in the agreement, "combined with the 20-year interdependent relationship . . . reinforced [the franchisee's] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there." (*Id.* at p. 482.)

The situation here is materially different from the one in *Burger King*. This case involves a simple consumer transaction, not a complex commercial enterprise. Signet was the one who "deliberately reached out" to initiate business with appellants, and no "wide reaching" contacts between them were ever contemplated. Insofar as it appears from the record, appellants are merely unsophisticated consumers who responded to Signet's credit card solicitation, used the card and made payments on the card. In so doing, we do not think they "deliberately affiliated" themselves with Virginia in any meaningful sense, or that they would have reasonably foreseen the need to go there to defend themselves in any dispute arising from the credit agreement.

Consumer transactions like the one here were expressly distinguished in *Burger King*. The court was "concern[ed]" that the case not lead to "the exercise of jurisdiction over 'out-of-state consumers to collect payments due on modest personal purchases.' " (*Burger King*

Corp. v. *Rudzewicz, supra,* 471 U.S. at pp. 484-485.) Therefore, the opinion went on to "emphasize[ ] that jurisdiction may not be grounded on a contract . . . whose application would render litigation 'so gravely difficult and inconvenient that a party will for all practical purposes be deprived of his day in court'. . . . [J]urisdictional rules may not be employed against small consumers so as to 'cripple their defense.' Just as the Due Process Clause allows flexibility in ensuring that commercial actors are not effectively 'judgment proof' for the consequences of obligations they voluntarily assume in other States, so too does it prevent rules that would unfairly enable them to obtain default judgments against unwitting customers. . . . [The] court must not be ' " 'blind' " ' to what ' " 'all others can see and understand.' " ' (*Id.* at p. 486 citations omitted.)

Appellants are plainly in the class of "unwitting customers" the *Burger King* court sought to protect. They had no relationship with Virginia other than their credit card, and it was fundamentally unfair to expect them to travel thousands of miles to litigate matters concerning their account. *Burger King* thus supports our conclusion and that of the *Tillis* court that the Virginia judgments against respondents' distant out-of-state cardholders were in excess of jurisdiction.

Accordingly, the Virginia judgment afforded no basis for the grant of summary judgment, and we must proceed to consider whether the judgment can be upheld as to any of the causes of action on other grounds. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 340, pp. 382-383 [judgment must be affirmed if correct on any legal theory].)

B. Abuse of Process and Unlawful Business Practice Claims

In *Barquis* v. *Merchants Collection Assn.* (1972) 7 Cal.3d 94, 98, our Supreme Court held that a creditor who files consumer debt collection actions in an improper venue, knowing that the venue is improper, for the purpose of impairing the debtors' ability to defend themselves, is guilty of "a gross 'abuse of process' " and an " 'unlawful . . . business practice' " within the meaning of what is now Business and Professions Code section 17200. In support of this conclusion, the court observed that the venue rules for relatively small claims stemmed from "recognition of the serious potential for harassment that arises if a plaintiff, in a small monetary action, commences his action in a distant forum. . . . [D]efendants in such cases will often be financially unable to expend the money to travel to a distant forum, or to hire an attorney to do so, even simply to move for a change of venue. Without the protection of [the venue statute], a plaintiff, aware of these practical limitations, could exploit the situation by filing all such actions in distant counties where a defendant could not afford either to defend or to move for change of venue, and could thereby unfairly obtain default judgments or favorable settlements in such actions." (*Id.* at p. 118.)

The practice of "distant forum abuse" (see generally Chen, *Due Process As Consumer Protection: State Remedies For Distant Forum Abuse* (1986) 20 Akron L.Rev. 9, 10-13) alleged in appellants' case is even worse than the one condemned in *Barquis*, because the practice there involved suits in the wrong venue within California,

whereas the practice here involves suits in the wrong *jurisdiction* – the even more distant forum of another state. In *Barquis* a demurrer had been sustained without leave to amend, so the court was required to accept the truth of the facts pled (*Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 318), whereas here, where a summary judgment was granted, the evidence must be viewed in the light most favorable to appellants' claims (*Eagle Oil & Ref. Co.* v. *Prentice* (1942) 19 Cal.2d 553, 556). Apart from these differences, which are of no assistance to respondents, *Barquis* is not distinguishable.

The venue statutes applied in *Barquis* required that the collection suits be filed in the county where the debtor lived, or the county where the contract was formed or to be performed, and the creditor was required to state facts under oath demonstrating that the venue was proper. The creditor in *Barquis* filed verified form complaints which simply alleged on information and belief that the account was "payable" in the county where the suit was filed. This allegation did not satisfy the requirement that proper venue be shown, the venue was in fact improper, and the debtors alleged that the venue allegation was kept deliberately vague to conceal that fact from the court. It thus appeared that the creditor had "knowingly and willfully instituted actions against consumers in the wrong county, under inadequate complaints, for the ulterior purpose of impairing these individuals' defenses of the action and with the intent of securing default judgments by virtue of the inconvenience of the improper forum." (*Barquis* v. *Merchants Collection Assn., supra,* 7 Cal.3d at p. 103.)

Similarly here, appellants submit that respondents sued California cardholders in Virginia, knowing, at least after the decision in the *Tillis* case, that any judgment they might obtain against them would be void for lack of jurisdiction. Respondents did so, appellants contend, knowing that the Californians would be unlikely to appear, in order to use the default judgments to obtain improper garnishment orders and settlement leverage. The evidence shows that respondents obtained thousands of default judgments and collected millions of dollars through their long-arm program. The evidence suggests that respondents may have consciously taken a "class action risk," in the hope that it could be avoided if no action were taken against people like attorneys and "celebrities" who might challenge or publicize the program. Viewed in the light most favorable to appellants' abuse of process claim, the record raises triable issues of fact concerning respondents' knowledge and intent which cannot be resolved on a motion for summary judgment.

Respondents contend that *Barquis* is distinguishable "given Signet's compliance with Virginia procedures and clear Virginia precedent approving Signet's action." However, there is no such "clear Virginia precedent." Respondents' assertion is based entirely on letters or orders, all apparently unpublished, by judges from the state district court in Richmond, Virginia. In 1986, Judge Wimbish wrote to the parties in a case involving a credit card issued to an out-of-state resident by the Bank of Virginia, and explained the reasons for his denial of the cardholders' motion to dismiss for lack of jurisdiction. In 1988, another judge wrote the parties in another Bank of

Virginia case and adopted Judge Wimbish's reasoning by reference. In 1993, another judge filed an order denying a motion to set aside a default judgment obtained by Signet against an individual who was living in Florida. The order does not indicate whether the case involved a credit card.

Respondents cite no authority demonstrating that these trial court letter opinions and orders had any force of precedent in Virginia. "The question . . . is not what a trial court intended in a particular case but the preclusive effect its judgment has under the controlling legal principles of its own State" (*Baker* v. *General Motors Corporation* (1998) 522 U.S. 222, ___ [118 S.Ct. 657, 671], conc. opn. of Kennedy, J.), and the Virginia Supreme Court has opined that a trial court's view of its own jurisdiction is "never conclusive" (*Slaughter* v. *Commonwealth of Virginia, supra,* 284 S.E.2d at p. 827). No Virginia appellate court has approved the exercise of "long arm" jurisdiction over out-of-state consumers for debt collection purposes.

Thus, respondents cannot escape liability for distant forum abuse simply because they managed to persuade some local judges to go along with their scheme. While this fact may constitute some evidence on the question of whether respondents recognized that their actions were unlawful, it does not establish that there was ever any Virginia law that purported to approve of what they were doing.

Respondents advance various reasons why they cannot be held liable in California for an abuse of process that occurred in another state. These arguments are untenable.

Respondents submit that no abuse of process can be found because California cannot "regulate" conduct "that is lawful in other states." We are not persuaded that respondents long-arm program was "lawful" in Virginia, but there is no merit to respondents sweeping assertion in any event. In the absence of any federal preemption, a defendant who is subject to jurisdiction in California and who engages in out-of-state conduct that injures a California resident may be held liable for such conduct in a California court. (See, e.g., *Vons Companies, Inc.* v. *Seabest Foods, Inc., supra,* 14 Cal.4th at pp. 476-477; *Quattrone* v. *Superior Court* (1975) 44 Cal.App.3d 296, 303-307; *People ex rel. Mosk* v. *National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 776-777.) It is irrelevant whether the conduct was lawful in other states.[2]

Respondents' sole authority to the contrary, *BMW of North America, Inc.* v. *Gore* (1996) 517 U.S. 559, confirms this point. In that case, an Alabama jury awarded punitive damages against BMW under Alabama law for failing to tell an Alabama purchaser that the new car he bought had been repainted. BMW followed a nationwide policy of not advising its dealers of damage to new cars

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[2] Choice of law principles may dictate that California law be applied to out-of-state conduct, even if the conduct is permissible there (see, e.g., *Application Group, Inc.* v. *Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 894-905; 5 Witkin, Summary of Cal. Law, Torts, § 328, et seq.), and in that sense California may also "regulate" conduct which is "lawful" in other states. Respondents do not seek to defend the judgment based on the choice of law provision in the credit agreement, and could not do so because there is no Virginia or federal law permitting their "long-arm" practice.

when the cost of repair did not exceed three percent of the suggested retail price. There are different rules throughout the country governing disclosures of new car repairs, and BMW's policy was consistent with the laws of many states. The jury arrived at the punitive damage award by multiplying the plaintiff's compensatory damages by the number of similar sales in other jurisdictions. The court held that the punitive damages were improper to the extent that they were based on BMW's conduct outside of Alabama.

The court acknowledged that Alabama had a legitimate interest in protecting its own citizens from deceptive trade practices, but concluded that "principles of state sovereignty and comity" prevented the imposition of punitive damages "with the intent of changing the tortfeasors' lawful conduct in other states." (*BMW of North America, Inc.* v. *Gore, supra,* 517 U.S. at pp. 568, 572.) "By attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws . . . *must be supported by the State's interest in protecting its own consumers and its own economy.* Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred *and that had no impact on Alabama or its residents.* Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." (*Id.* at p. 572-573, italics added, fn. omitted.) Thus, the punitive damages could be awarded "with

consideration given only to the interests of Alabama consumers, rather than those of the entire nation." (*Id.* at p. 574.)

The *BMW* case would thus prohibit an award of punitive damages herein to punish or deter respondents' conduct with respect to consumers in states other than California. However, appellants are not seeking any such award. *BMW* establishes that California may indeed protect its own consumers, and punish the conduct of an out-of-state defendant if it has an impact on them regardless of whether the conduct might be lawful elsewhere.

Respondents note that appellants' abuse of process and unlawful business practice claims are based on a sister state judgment, and maintain that principles of sovereignty and comity require that such judgments not furnish a basis for liability. This argument is grounded on the false assumption that the judgment in question was "lawful" and "valid" in Virginia. (*World Wide Volkswagen Corp.* v. *Woodson, supra,* 444 U.S. at p. 291 [judgment in excess of jurisdiction is void where rendered].) It has been "repeatedly stated [that] California must, regardless of policy objections, recognize the judgment of another state as res judicata, and this is so even though the action or proceeding which resulted in the judgment could not have been brought under the law or policy of California." (*World Wide Imports, Inc.* v. *Bartel* (1983) 145 Cal.App.3d 1006, 1011.) However, that recognition is required only where the judgment is a "valid" one (*ibid.*; see also *Tyus* v. *Tyus* (1984) 160 Cal.App.3d 789, 793), and, as previously explained, the judgment here was "an absolute nullity." (*Pennoyer* v. *Neff, supra,* 95 U.S. at p. 732.) It has been held that "[w]here another state has fully and fairly litigated

its jurisdiction, and has finally decided the question, a second state may not reexamine the question." (*St. Sava Mission Corp.* v. *Serbian Eastern Orthodox Diocese* (1990) 223 Cal.App.3d 1354, 1364.) However, jurisdiction was not litigated in the proceedings that resulted in the default judgment against appellants.

Respondents contend that, even if a California court could properly inquire into the validity of the Virginia judgment in a proceeding to enforce the judgment, such an inquiry cannot be used "to award affirmative relief." Respondents posit the following "endless round of judicial Paper/Rock/Scissors" if a right of action is authorized on the basis of an invalid foreign judgment:

"Litigant A sues B in Texas. B either ignores the suit or contests personal jurisdiction and loses the argument. A obtains a judgment in Texas for $100,000. Undeterred, B sues A in Ohio, claiming that the Texas proceedings were void, and an abuse of process. Ohio agrees with B and disagrees with the Texas court on the issue of personal jurisdiction over B in Texas. The Ohio court enters judgment for B for $100,00, [sic] the damages suffered by the consequences of the 'unlawful' proceedings in Texas, whereupon, A files suit in Nebraska, alleging that Texas was right and Ohio was wrong. And so on."

In respondents' view, "[t]he Full Faith and Credit Clause prevents this sort of cross-border tug-of-war by requiring state courts to restrain from reviewing decisions of foreign state courts except where the second court is called upon to lend aid to the enforcement of the foreign state's prior judgment." Again, however, there is no authority under the Full Faith and Credit clause for

this proposed limitation on sister states' ability to examine each other's jurisdiction to render a judgment. As previously noted, if the issue with respect to a judgment is whether it is entitled to full faith and credit, then an inquiry can always be made into the subject matter and personal jurisdiction of the rendering court. (*Underwriters Nat'l. Assur.* v. *N.C. Life & Acc., supra,* 455 U.S. at p. 705.) The scenario respondents posit should never arise in any event, and nothing in our decision should cause it to occur.

Once an issue has been finally determined by a court with "jurisdiction, in the fundamental sense over the subject matter and the parties" (*Barquis* v. *Merchants Collection Assn., supra,* 7 Cal.3d at p. 120), the decision "qualifies for recognition" throughout the land. (*Baker* v. *General Motors Corporation, supra,* 522 U.S. at p. ___ [118 S.Ct. at p. 664].) This recognition is required even if the issue is itself whether the rendering court had this "fundamental" jurisdiction. (*St. Sava Mission Corp.* v. *Serbian Eastern Orthodox Diocese, supra,* 223 Cal.App.3d at p. 1364.) It is also required once the jurisdictional issue has been "fully and fairly litigated" between the parties. (*Durfee* v. *Duke* (1963) 375 U.S. 106, 111.) Full faith and credit "generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." (*Id.* at p. 109.) Thus, if defendant B in the first suit in the hypothetical had in fact appeared in that case, contested personal jurisdiction and lost, then B would be collaterally estopped from relitigating the issue in a different forum. The court in the second case would be bound to accept the prior judgment on the matter, even if it were

inclined to disagree with it. (*St. Sava Mission Corp.* v. *Serbian Eastern Orthodox Diocese, supra,* 223 Cal.App.3d at p. 1364.)

The Virginia court's jurisdiction is an open issue in this case because it has not previously been litigated between the parties, and a California court is therefore free to resolve the issue according to its own best judgment. Since it is conceded that we have the fundamental jurisdiction to do so, and the matter is being fully and fairly litigated herein, our determination will be entitled to full faith and credit elsewhere. Thus, the matter should end here, in California, when the case becomes final. The losing party could no more relitigate the question in another state than in another action in California. (*Durfee* v. *Duke, supra,* 375 U.S. at p. 109.)

We conclude that *Barquis'* holding can be applied to respondents' conduct, even though the distant foreign abuse occurred in another state and involved the procuring of a foreign judgment. Since respondents have no dispositive arguments or evidence in their favor on the abuse of process and unlawful business practice claims, summary judgment was erroneously granted as to those causes of action.[3]

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[3] For purposes of the trial of those claims, we note that appellants can argue that respondents' long-arm practice was both "unlawful" and "unfair" within the meaning of Business and Professions Code section 17200. The *Barquis* court found it unnecessary to determine whether the distant forum abuse in that case was "unfair" as well as unlawful. However, as we have observed, the abuse in this case was even worse than the practice labeled "gross" in *Barquis*. (*Barquis* v. *Merchants Collection Assn., supra,* 7 Cal.3d at p. 98.) If follows from our

C. Other Statutory Violations

The first cause of action in appellants' complaint is for violation of Code of Civil Procedure section 395, subdivision (b), which provides in relevant part: "Subject to the power of the court to transfer actions or proceedings as provided in this title, in an action arising from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, . . . the county in which the buyer or lessee resided at the time the contract was entered into, or the county in which the buyer or lessee resides at the commencement of the action is the proper county for the trial thereof." Appellants contend that Signet violated this venue statute by suing them in Virginia.

The third cause of action in the complaint is for violation of Code of Civil Procedure section 1710.10, et seq., which set forth the procedures for entry of a California judgment based on a sister state judgment, and Code of Civil Procedure section 1913, subdivision (a), which provides in pertinent part that "the effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced in this state by an action or special proceeding." Appellants contend that Signet violated these statutes when it enforced the Virginia judgment by serving a

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discussion of due process that obtaining default judgments in the wrong jurisdiction, if done with the requisite conscious intent, was a fundamentally unfair business practice.

wage garnishment order in Virginia, rather than domesticating the judgment in California as provided in these statutes.

The sixth cause of action is for violation of Civil Code section 1788.15, which states that: "(a) No debt collector shall collect or attempt to collect a consumer debt by means of judicial proceedings when the debt collector knows that service of process, where essential to jurisdiction over the debtor or his property, has not been legally effected. [¶] (b) No debt collector shall collect or attempt to collect a consumer debt, other than one reduced to judgment, by means of judicial proceedings in a county other than the county in which the debtor has incurred the consumer debt or the county in which the debtor resides at the time such proceedings are instituted, or resided at the time the debt was incurred." (Civ. Code, § 1788.15.) Appellants contend that Signet violated these provisions of the Robbins-Rosenthal Fair Debt Collection Practices Act by suing them in Virginia before their debt was otherwise "reduced to judgment," and by improperly garnishing Mr. Yu's wages.

The Fair Debt Collection Practices Act provides for recovery in an individual action of the debtor's actual damages, as well as reasonable attorney's fees and costs, plus a fine of $100 to $1,000 if the creditor's violation is willful and knowing. (Civ. Code, § 1788.30.) Appellants seek tort damages for the alleged violations of the Code of Civil Procedure under the theory that " 'violation of a statute embodying a public policy is generally actionable even though no specific remedy is provided in the statute; any injured member of the public for whose benefit the statute was enacted may bring an action.' [¶] The

effect of such statutes, in essence, is to create a duty or standard of conduct, the breach of which, where it causes injury, gives rise to liability in tort." (*Castillo* v. *Friedman* (1987) 197 Cal.App.3d.Supp. 6, 14 [citations omitted]; see *Czap* v. *Credit Bureau of Santa Clara Valley* (1970) 7 Cal.App.3d 1, 6 [recognizing tort action for violation of former unfair debt collection practice statute]; Debt Collection Tort Practice (Cont.Ed.Bar 1971) pp. 84-86.) We need not decide whether damages are recoverable under this theory because these statutes are inapplicable in appellants' case in any event.

In our view, none of these statutes was meant to govern conduct outside of California. As previously explained, there is no constitutional impediment to a finding that respondents conduct was unlawful under Business and Professions Code section 17200. That statute has been held to preclude the particular practice at issue here – that of distant forum abuse – but it only proscribes unlawful business practices in general terms, and does not purport to direct that any particular debt collection procedure be followed here in California or elsewhere. In contrast, appellants would have us interpret the Code of Civil Procedure and Civil Code as establishing the sole means by which California consumer debts can be collected and foreign judgments can be enforced. Unlike their interpretation of Business and Professions Code section 17200, appellants' proposed interpretation of the Code of Civil Procedure and Civil Code *would* have constitutional implications.

According to appellants, Code of Civil Procedure section 395, subdivision (b) establishes the one and only venue throughout the nation where an action against a

California consumer can be filed, and Civil Code section 1788.15 prohibits any judicial proceeding anywhere else until a judgment is obtained against the consumer in that local venue. Similarly, appellants would have us construe Code of Civil Procedure section 1710, et seq. and 1913 to "requir[e] domestication of sister state judgments" any time they are to be enforced against Californians. However, if appellants had traveled every month to Virginia and maintained a bank account there, then we would have a different case where they could have been sued on the debt in Virginia, and had their account attached in accordance with Virginia law without any domestication of the judgment in California.[4] Nothing on the face of the statutes in question suggests that they were meant to apply to that situation, or to preclude any lawful process or debt collection practice in another state.

To construe these statutes in the manner appellants advocate could make them the kind of extra-territorial legislation the United States Constitution forbids. (See *BMW of North America, Inc.* v. *Gore, supra,* 517 U.S. at p. 571 [no state can "impose its own policy choice" on others, or "legislate except with reference to its own jurisdiction"].) "[T]he fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another." (2A Sutherland Statutory Construction (1992)

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[4] Appellants' counsel effectively conceded this at oral argument on the summary judgment motion: "The Court: 'Okay. Supposing the Yus had a bank account in Virginia, would they still have . . . had to come to California to domesticate – to collect it.' [¶] [Counsel]: 'If the judgment had been valid, the Yus had a bank account, they could probably attach the bank account.' "

§ 45.11, p. 49.) Accordingly, we decline to interpret these statutes to apply to conduct outside California, and conclude that summary judgment was correctly granted as the first, third and sixth causes of action.[5]

D. Other Claims

Appellants' seventh cause of action is for negligent infliction of emotional distress. In general, a plaintiff "incurring neither physical impact nor physical damage, and whose loss (other than emotional distress) is solely economic, is entitled neither to punitive damages nor to a recovery for emotional distress." (*Branch* v. *Homefed Bank* (1992) 6 Cal.App.4th 793, 799-800; see also *Smith* v. *Superior Court* (1992) 10 Cal.App.4th 1033, 1040 ["mere negligence will not support a recovery for mental suffering where the defendant's tortious conduct has resulted in only economic injury to the plaintiff"].) It is undisputed that appellants suffered no physical injury as a consequence of respondents' conduct, and their case is not one of those involving "negligence of type which will cause highly unusual as well as predictable emotional distress" which are excepted from the general rule requiring physical injury. (*Branch* v. *Homefed Bank, supra,* at p. 800 [citing cases involving misdiagnosis of syphilis and mishandling of cremated remains].) Thus, summary judgment was properly granted as to the cause of action for negligent infliction of emotional distress.

---

[5] In view of this conclusion, appellants can press no claim for abuse of process associated with violation of these statutes.

Summary judgment was also proper as to appellants' eighth cause of action for intentional infliction of emotion [sic] distress. Recovery on this theory requires a showing of "outrageous" conduct which is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson* v. *City of Westminster* (1982) 32 Cal.3d 197, 209.) An assertion of legal rights in pursuit of one's own economic interests does not qualify as "outrageous" under this standard. (*Trerice* v. *Blue Cross of California* (1989) 209 Cal.App.3d 878, 883; *Kruse* v. *Bank of America* (1988) 202 Cal.App.3d 38, 67.)

Appellants have abandoned their fourth cause of action for violation of due process under the California Constitution. (See *Kruger* v. *Wells Fargo Bank* (1974) 11 Cal.3d 352, 359 [state action requirement].)

III. CONCLUSION

The judgment in favor of respondents is reversed as to appellants' second cause of action for abuse of process and fifth cause of action for an unlawful business practice, and affirmed as to all other causes of action. The parties shall bear their own costs on appeal.

Hanlon, P.J.

We concur:

Reardon, J.

Sepulveda, J.

Trial Court:	Superior Court Alameda County
Trial Judge:	Honorable John Kraetzer
Counsel for Appellants:	James C. Sturdevant Kim E. Card The Sturdevant Law Firm
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COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 4

WILLIAM YU, et al.,
Plaintiffs and Appellants,

v.

SIGNET BANK/VIRGINIA, et al.,
Defendants and Respondents.

(Filed
Mar. 16, 1999)

A077911
Alameda County No. H1846748

BY THE COURT:

The petition for rehearing is denied.

Date: MAR 16 1999 HANLON P.J.

First Appellate District, Division Four, No. A077911
S077682
IN THE SUPREME COURT OF CALIFORNIA

WILLIAM YU Et Al., Appellants

v.

SIGNET BANK/VIRGINIA
Et Al., Respondents

(Filed
May 26, 1999)

Petition for review DENIED.

/s/ George
Chief Justice

Supreme Court, U.S.
FILED
SEP 24 1999
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No. 99-341

In the

Supreme Court of the United States

October Term, 1998

SIGNET BANK/VIRGINIA, a Virginia corporation,
CAPITAL ONE BANK, a Virginia corporation,
and DOES 2-100,

Petitioners

vs.

WILLIAM YU and DARLENE YU, individually and
on behalf of others similarly situated,

Respondents

On Petition for a Writ of Certiorari
To the Court of Appeal for the State of California,
First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under 28 U.S.C. § 1257 when no final judgment has been entered by the California Court of Appeal which reversed the grant of summary judgment and remanded for further proceedings.

2. Whether the California Court of Appeal correctly concluded as a matter of federal law that personal jurisdiction may be collaterally attacked in a judicial forum which did not enter the default judgment.

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No. 99-341

In The

SUPREME COURT OF THE UNITED STATES

SIGNET BANK/VIRGINIA, a Virginia corporation,
CAPITAL ONE BANK, a Virginia corporation,
and DOES 2-100,

Petitioners,

vs.

WILLIAM YU and DARLENE YU, individually and
on behalf of others similarly situated,

Respondents.

On Petition for a Writ of Certiorari
To the Court of Appeal for the State of California,
First Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Judgment of the Court of Appeal was entered on February 16, 1999. (App. at 1).[1] The Court of Appeal reversed the trial court's grant of summary judgment for Petitioners on two causes of action. It affirmed as to all other causes of action. (App. at 29). The Court of Appeal denied Petitioners' Petition for Rehearing on March 16, 1999. (App. at 31). The California Supreme

[1] All references to the California Court of Appeal's Opinion are to the Appendix ("App.") to the Petition for a Writ of Certiorari.

Court denied Petitioners' Petition for Review on May 26, 1999. This Court lacks jurisdiction under 28 U.S.C. § 1257 because the Judgment of the Court of Appeal is not a final judgment.

COUNTER-STATEMENT OF THE CASE

William and Darlene Yu are California residents. Petitioners Capital One and Signet Bank are Virginia corporations with their principal places of business in Virginia. In 1989, the Yus received an unrequested "pre- approved" solicitation by mail from Signet Bank/Virginia ("Signet"), inviting and encouraging them to accept a credit card from the Bank. The Yus accepted the offer by signing a brief, pre-printed acceptance form in California, and returned it in the mail. The Yus received the credit card in the mail in California and used it for personal, family and household purposes. It is undisputed that the Yus never lived or worked in Virginia, never met with a Signet representative in Virginia at any time for any reason, and never used the card in Virginia. They used the card for only one year.

Signet developed a written "long-arm program" to deal with out-of-state debtors who, Signet contended, owed it money from credit card accounts. This "long-arm program," originated in 1983, and carried on by Capital One from March, 1995, after a "spin-off" of Signet's credit card operations to Capital One, was designed to obtain default judgments against cardholders across the country, knowing that the vast majority could not, or would not, object to jurisdiction or make an appearance in the Virginia action. More than 90% of Petitioners' "long-arm" actions resulted in a default judgment against the out-of-state consumer cardholder. When a lawsuit was filed in Virginia, Petitioners mailed what they called a "change of jurisdiction letter" to the out-of-state cardholder. The letter advised the cardholder that "[w]e intend to file suit against you in Virginia," and that "[i]f you would prefer the trial to be in your state, we must receive written notice from you within twenty-one days of this letter." If the cardholder requested a change of jurisdiction within the time limit, Petitioners dismissed the Virginia action. Out-of-state cardholders who indicated they

could not appear in court for "lack of money; too far to travel; etc." were not considered by Petitioners to have made a valid request for change of jurisdiction, and Virginia suits would proceed to judgment against those customers, generally (almost always) by default.

Petitioners' documents and testimony demonstrated that they knew the Virginia court could not properly exercise personal jurisdiction over out-of-state cardholders and that, as a result, their "long-arm program" was at best suspect, and at worst obviously illegal. In 1990, years prior to the commencement of the action by the Yus in this case, a Georgia court of appeals issued a decision specifically concluding that Signet's "long-arm" practices violated the due process rights of out-of-state cardholders, and that the resulting default judgments were therefore void and unenforceable. *Signet Bank/Virginia v. Tillis*, 196 Ga. App. 433, 436, 396 S.E.2d 54, 57 (1990). The Georgia Supreme Court denied review. Signet immediately discontinued its practice of seeking the entry of judgment in the debtor's state of residence based upon the sister state default judgments entered in Virginia. It made no other changes to its "long-arm program" in response to *Tillis*.

Petitioners' written collection guidelines listed "[p]eople in the limelight, celebrities, attorneys" among the cardholders who were "not candidates for Legal Action." A Capital One vice president testified in deposition that suing out-of-state attorneys was regarded as "a bad business decision." With respect to "celebrities," he testified, "We didn't want to expose the company to any press because we hadn't done everything we needed to do." "Class action risk" was listed among the "real and assumed cost[s]" of the "long- arm program" in 1994. "Signet needs to realize the potential risk of a class action suit," the document stated, "and to do the right thing in order to prevent a future loss to the bank." In short, Petitioners took many steps affirmatively to conceal their unconstitutional process from any review.

In 1990, Signet ceased mailing statements to the Yus. The Yus' last payment on the account was made by mail from

California in May, 1990, in response to the last statement they received from Signet. More than four years later, in August, 1994, the Yus received a document in the mail from Signet entitled "Warrant in Debt." The Yus did not understand the nature or legal effect of the document, and did not respond. In October, 1994, the Yus received another document from Signet entitled "Garnishment Summons." Again, they did not understand the nature or legal effect of the document, and did not know what to do in response.

Unbeknownst to the Yus, the "Warrant in Debt" was, in fact, the functional equivalent of a summons and complaint filed against them in the municipal court of Richmond, Virginia by Signet, seeking a judgment for the allegedly unpaid balance of the Yus's credit card debt. Although the Yus received a copy of the Warrant in Debt by mail, formal service of process was effected by service on the "Secretary of the Commonwealth" of Virginia because the Yus were "non-residents." When the Yus failed to appear and defend the action, Signet procured a default judgment against them. Signet then obtained a "Garnishment Summons," issued by the Virginia municipal court, and served it on a Virginia branch office of Mr. Yu's corporate employer, Silicon Graphics, with instructions to forward the Summons to the company's headquarters in Mountain View, California, where Mr. Yu was employed. Commencing in November, 1994, Signet garnished William Yu's wages, in California, in increments of approximately $300 every two weeks, for approximately six months, until it had seized a total of almost $4,000. Signet never attempted to domesticate the Virginia default judgment in California under the procedures set forth in the Sister State Money Judgment Act, California Code of Civil Procedure § 1710.10, *et seq.*

Shortly after the instant action was filed, in the fall of 1995, Petitioners terminated their "long-arm program" altogether, and issued a written internal policy that long-arm default judgments and garnishment proceedings based on those judgments could no longer be used as leverage in collection activities.

During the four-year period immediately preceding the filing of this action, Petitioners obtained at least 7,575 judgments in Virginia municipal courts against at least 8,812 California consumer cardholders. By their own estimate, Petitioners collected at least $3.5 million from California consumer cardholders during this four- year period after a "long-arm" judgment had been entered in Virginia municipal courts against them.

In June, 1995, the Yus brought a proposed class action in California state court seeking damages and injunctive relief against Petitioners for subjecting California consumer credit card holders to suit in Virginia. The premise of each claim was that the Virginia courts lack personal jurisdiction and Petitioners had acted unconstitutionally in obtaining default judgments and extracting money through the resulting garnishment proceedings.

In December, 1996, Petitioners moved for summary judgment claiming that the Yus' affirmative suit was a collateral attack upon a final judgment of a Sister State and was impermissible under the full faith and credit clause. The trial court granted summary judgment to Petitioners. (App. at 6-7).

In February, 1999, the California Court of Appeal entered judgment reversing the trial court with respect to the Yus' causes of action for abuse of process and for alleged acts of unfair competition under California Business and Professions Code § 17200, *et seq.* The court held that the Yus could collaterally attack Virginia's default judgment against them for lack of personal jurisdiction because they had no "minimum contacts" with Virginia and "it was fundamentally unfair to expect them to travel thousands of miles to litigate matters concerning their account." (App. at 13).

REASONS FOR DENYING THE WRIT

First, this Court lacks jurisdiction under 28 U.S.C. § 1257. That statute requires the issuance of a "final judgment."

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; and must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).
>
> *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 118 S.Ct. 481, 485-86 (1997).

The Court of Appeal's decision was interlocutory because it concluded only that the grant of summary judgment by the trial court as to two causes of action was subject to reversal. As a result of its Judgment, the case has been remanded to the trial court for trial of those issues. Nor does this case come within the "limited set of situations in which [the Court] ha[s] found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

Second, Petitioners have demonstrated no provision of Rule 10 of this Court which would augur in favor of review. Petitioners identify no conflicting case from any other state or from a United States Court of Appeals. Although they terminated the "long arm" program four years ago, shortly after this lawsuit was filed, Petitioners continue to raise the unsupported specter of "quantities of litigation that will further destabilize Sister State judgments, unless this Court grants *certiorari* to stem the flow and to bring California back into the full faith and credit fold." Petition at 5. The Court of Appeal correctly noted, "[t]here is no

authority under the full faith and credit clause for [any] proposed limitation on sister states' ability to examine each other's jurisdiction to render a judgment. Where a sister state's personal jurisdiction is challenged, 'an inquiry can always be made into the subject matter and personal jurisdiction of the rendering court'" (App. at 22), *citing Underwriters Nat'l Assur. v. N.C. Life and Acc.*, 455 U.S. 691, 705 (1982). *See also Burnham v. Superior Court*, 495 U.S. 604, 609 (1990); *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Pennoyer v. Neff*, 95 U.S. 714, 732 (1877).

The refusal by the Court of Appeal to adopt reflexively the judgment of the Virginia court was premised not only on centuries of jurisprudence from this Court, but upon Virginia's own understanding of the full faith and credit clause as well. The California court's partial reversal of summary judgment on the largely undisputed factual record before it presents no decision of an important federal question that in any way conflicts with the decision of any other court or that should be revisited by this Court.

I. THE COURT OF APPEAL'S PARTIAL REVERSAL OF SUMMARY JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS DOES NOT CONSTITUTE A FINAL JUDGMENT UNDER 28 U.S.C. § 1257.

Since enactment of the Judiciary Act of 1789, the jurisdiction of this Court to review federal questions made by state courts has been limited to cases in which the state's judgment is final. The applicable statute regarding the Court's jurisdiction to review state court decisions is 28 U.S.C. § 1257(a). It provides as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or a statute of the United States is drawn in question or

> where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, rank, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This statute has been held to establish a firm final judgment rule. As this Court recently made clear in *Jefferson v. City of Tarrant, Ala., supra,* a state court judgment must be "final" in two senses to be reviewable by this Court. "It must be subject to no further review or correction in any other state tribunal and it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." 118 S.Ct. at 485-86. In cases such as the instant one, where the judgment of a state court remands a case for trial, "its decision is not final 'as an effective determination of the litigation.'" *O'Dell v. Espinoza,* 456 U.S. 430 (1982) *(per curiam), cited with approval in Jefferson, supra,* 118 S.Ct. at 486. The denial of summary judgment, or the reversal of summary judgment and remand for trial, does not constitute a "final" judgment of a state court that is subject to this Court's review.

Nor does this case come within any of the exceptions to the finality doctrine discussed in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469. Those exceptions include: (1) those cases in which there are further proceedings but the federal issue was conclusive, or the outcome of further proceedings is pre- ordained; (2) cases in which the federal issue will survive and require decision, regardless of the outcome of future state proceedings; (3) cases in which the federal claim has been finally decided, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case; and (4) cases in which the federal issue has been finally decided in the state courts, with further proceedings pending, if a refusal immediately to review the state court decision might seriously erode federal policy. *Cox, supra,*

420 U.S. at 479-85; *see also* Stern, Gressman, Shapiro and Geller, *Supreme Court Practice*, at 102-103 (7th ed. 1993).

Jefferson is dispositive of the Petition in this case because in both cases the state court resolved a federal question and remanded the case for trial of the remaining claims. As in *Jefferson*, none of the *Cox* exceptions is present here. This is clearly not a case in which the federal issue is conclusive or the outcome of further proceedings pre-ordained. (*Cox* exception one.) The decision on the federal issue merely permits the Respondents to proceed to resolve their abuse of process state tort claim. Nor is this a case in which the federal issue will survive and require decision, regardless of the outcome of future state court proceedings. (*Cox* exception two.) On the contrary, this case specifically fits within the rationale of *Jefferson* that resolution of the state law claims could moot the federal law question raised in the Petition.

In order to prevail on their state law claims, Respondents will have to convince the trier of fact that they are entitled to judgment for either abuse of process or violation of California's Unfair Competition Law, Business and Professions Code § 17200, *et seq.*, or both. Should they fail to do so on either factual or state law grounds, the case will be at an end, mooting the federal law question. Should Respondents prevail at trial and on any state court appeal that may be had, Petitioners will be free to raise their federal question issues in a subsequent petition to this Court if the issue survives the state court process. *Jefferson, supra,* 118 S.Ct. at 486.

The third *Cox* exception is equally inapplicable. The abuse of process claim necessarily includes an allegation that Petitioners obtained judgments that were void for want of jurisdiction. Petitioners will be able to have this claim reviewed if it survives the trial and state appellate process. *Id.* Lastly, the fourth exception is inapposite because there has been no final decision on the federal issue in the California courts. There is no evidence that a refusal immediately to review the state court decision might seriously erode federal policy.

This Court has consistently interpreted the requirement of a "final judgment" in 28 U.S.C. § 1257(a) in a narrow manner. The Court has been especially careful to ensure that cases arising from state courts meet the final judgment rule.

> This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a state court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious state-federal relations.
>
> *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62, 67 (1948).

In the context of summary judgment, this Court has applied the final judgment rule to dismiss an appeal from a state court for want of a final judgment. In *Ashland Oil, Inc. v. Rose*, 177 W.Va. 20, 350 S.E.2d 531 (1986), the West Virginia Supreme Court reversed a summary judgment concerning the retroactive effect of a state tax matter, and remanded to the trial court for further proceedings concerning the applicability of the tax in question. Ashland appealed. This Court dismissed the appeal for want of a final judgment. *Ashland Oil, Inc. v. Rose*, 481 U.S. 1025 (1987) (mem.).

For the foregoing reasons, the Court lacks jurisdiction to review the decision of the Court of Appeal. The Petition for a Writ of Certiorari should be denied.

II. THIS CASE IS UNIQUE AND THERE IS NO CONFLICT WITH ANY DECISION FROM ANY OTHER STATE OR FROM A UNITED STATES CIRCUIT COURT OF APPEALS.

The decision below and this case are unique. There is no conflict between the California Court of Appeal decision in this case and any decision from any other state or any United States Circuit Court of Appeals. That is because no entity or individual other than Petitioners would have the temerity to seek review in this Court on this record. The Yus, who never lived or worked in Virginia, accepted an unsolicited "pre- approved" credit card from Petitioners and used it for personal, family and household purposes for one year. When they became unable to continue their payments, Petitioners obtained a default judgment against the Yus in Virginia, without their knowledge, pursuant to Petitioners' "long arm" program for out-of-state credit card debtors, and garnished Mr. Yu's wages through a Virginia branch of Mr. Yu's California employer.

On the largely undisputed evidentiary record on Petitioners' motion for summary judgment, the Court of Appeal followed this Court's precedents in concluding that the Yus had established no minimum contacts with Virginia sufficient for personal jurisdiction.

Personal jurisdiction over a defendant who resides outside the forum requires under principles of due process that "he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). A defendant must have "'purposely directed' his activities at residents of the forum," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), "'such that he should reasonably anticipate being haled into court there.'" *Id.* at 474. And even with respect to interstate agreements, "'attenuated'" contacts with the forum are insufficient to confer personal jurisdiction. *Id.* at 475. Critically, "jurisdictional rules may not be employed in

such a way as to make litigation 'so gravely difficult and inconvenient' that a party is at a 'severe disadvantage' in comparison to his opponent." *Id.* at 478.

On the record before it, the Court of Appeal correctly concluded that it was Signet, not the Yus, who "deliberately reached out" to initiate the relationship with the Yus. (App. at 12). The Georgia Court of Appeals reached the identical conclusion in 1990 on identical facts with respect to Signet's "long arm" program. *Signet Bank/Virginia v. Tillis, supra,* 396 S.E.2d 54. (App. at 10). Requiring unsuspecting consumers like the Yus to travel thousands of miles from California to Virginia to contest a lawsuit "[t]o collect payments due on modest personal purchases,'" *Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at 484-485, would "'cripple their defense'" and "unfairly enable [Petitioners] to obtain default judgments against unwitting consumers..." *Id.* at 486. The Yus are paradigm "unwitting consumers." They are people of modest means who never made purchases with their credit card in Virginia, and had no relationship with Virginia other than their credit card.

Far from creating a special class of credit card holders subject to unique jurisdictional rules, the Court of Appeal faithfully applied principles established by this Court to conclude that the Virginia default judgment "afforded no basis for the grant of summary judgment,..." (App. at 13). That conclusion conflicts with no decision from any other state or from a United States Court of Appeals. Thus, there is no basis for this Court to grant review.

III. THIS COURT HAS EXPRESSLY SANCTIONED COLLATERAL ATTACK OF SISTER STATE JUDGMENTS.

Petitioners press their prior argument that California lacks authority to determine whether the Virginia court had personal jurisdiction over plaintiffs. The Court of Appeal correctly rejected that argument. (App. at 8-9, 22). It is only where jurisdiction has

been fully and fairly litigated that a finding of personal jurisdiction must be given full faith and credit. Unbroken authority from this Court demonstrates this principle. In the leading case, *Underwriters Nat'l. Assur. v. N.C. Life & Acc., Inc., supra,* the Court held that before a court is bound by the judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree. If the rendering court did not have jurisdiction over the subject matter *or* the relevant parties, full faith and credit need not be given. The Court did not put artificial bounds on this inquiry, nor did it suggest that domesticated procedures are necessary to trigger the inquiry. Rather, in determining whether full faith and credit be given, the Court ascertained that the parties were before the court below and that they fully and fairly had litigated the question. 455 U.S. at 706-707.

In this case, since the Yus never appeared in the Virginia court and personal jurisdiction there was never contested by them, they properly challenged the jurisdiction of the Virginia court in this action. There was no determination of its own jurisdiction by the Virginia court. The Court of Appeal's holding that jurisdiction was not litigated in the proceedings that resulted in the default judgment against plaintiffs is undeniably correct. (App. at 23).

As Virginia's own Supreme Court has observed, "'If a judgment is void, it may be assailed anywhere at any time in any way by anybody. It is immaterial whether the assault be direct or collateral.'" *Slaughter v. Commonwealth*, 222 Va. 787, 284 S.E.2d 824, 827 (1981), *citing Beck v. Semones' Administrator*, 145 Va. 429, 134 S.E. 677, 680 (1926). Moreover, "'the fact that the trial court decided that such service or appearance was valid could not make it so. If the service or appearance was illegal, a decision of the trial court to the contrary could not make it legal. If such were true, then the trial court could never, under any circumstances, enter a void judgment.'" *Slaughter, supra,* 222 Va. at 793, 284 S.E. 2d at 793, *citing Beck, supra,* 144 Va. at 441; *accord Kelley v. Kelley*, 248 Va. 295, 449 S.E.2d 55, 56 (1994).

Moreover, a trial court's view of its own jurisdiction is "never conclusive." *Slaughter v. Commonwealth of Virginia, supra*, 222 Va. at 793, 284 S.E.2d at 827. "The question ... is not what a trial court intended in a particular case but the preclusive effect its judgment has under the controlling legal principles of its own State." *Baker v. General Motors Corp.*, 522 U.S. 222, 118 S.Ct. 657, 671 (1998) (Kennedy, J., concurring). As the California Court of Appeal correctly noted in this case, "No Virginia appellate court has approved the exercise [by Signet or anyone else] of 'long arm' jurisdiction over out-of-state consumers for debt collection purposes." (App. at 17). Thus, it was entirely consistent with the jurisprudence from both this Court and from the Virginia Supreme Court, for the Yus collaterally to attack the void judgment of the Virginia Municipal Court in California.

This Court has held that collateral attack of sister state judgments on jurisdictional grounds is valid. Just last term, in *Baker v. General Motors Corp., supra*, the Court allowed a collateral attack in a Missouri action of an injunction entered by a Michigan court. The Court held that the Missouri plaintiffs could not be bound by the Michigan injunction because they were not parties to that action and the Michigan court, therefore, had no jurisdiction to bind them to the judgment entered in the prior action. 118 S.Ct. at 666-667. *Baker* stands for the proposition that recognition of full faith and credit is owed to underlying dispositions that the rendering state has authority to order, but not to dispositions it had no power to make. *Id.* at 667. *Baker* thus sanctioned a collateral attack on the Michigan judgment's applicability in Missouri by individuals who were not parties to the Michigan proceeding.

No interstate conflict will result from the Court of Appeal's decision. The California Court of Appeal properly rejected Petitioners' contention that its decision will lead to interstate conflict. Once an issue has been finally determined by a court with jurisdiction over both the subject matter and the parties, the decision qualifies for recognition throughout the land. (App. at 22, *citing Barquis v. Merchants Collection Ass'n of Oakland*, 7 Cal.3d 94,

120, 101 Cal.Rptr.2d 745, 764, 496 P.2d 812 (1972), and *Baker, supra*, 118 S.Ct. at 664). This recognition is required once the jurisdictional issue has been fully and fairly litigated between the parties. *Durfee v. Duke* (1963) 375 U.S. 106, 111.

However, where the first state has not litigated and decided the question the jurisdiction of a court rendering a judgment is open to inquiry, when questioned in the court of another state. The party against whom the judgment is rendered is not forced to go to the state of the rendition of a judgment for relief. *Underwriters National Assurance v. N.C. Life & Acc., supra*, 455 U.S. at 705. Thus, as the California Court of Appeal correctly held, because the Virginia court's jurisdiction has not previously been litigated between the parties, a California court was free to resolve this issue according to its own best judgment. That determination, being fully and fairly litigated between the parties in the California court, is entitled to full faith and credit elsewhere. (App. at 23).

Although the pre-*Burger King* cases of *Brown* and *Kolbe* cited by defendants at page 6 of the Petition do state that the purpose of the Virginia long arm statute is to assert jurisdiction to the extent permissible under the due process clause of the federal Constitution, that is only the beginning of the inquiry. Numerous subsequent Virginia and federal cases have interpreted the Virginia long arm statute in light of *Burger King* and other Supreme Court cases.

Generally, analysis of in personam jurisdiction under Virginia law requires two steps: first, the court must determine whether the activity of the defendant falls within the long arm statute; and second, the court must decide whether the exercise of personal jurisdiction would violate the Due Process Clause of the 14th Amendment to the U.S. Constitution. *Peninsula Cruise, Inc. v. New River Yacht Sales, Inc.* 257 Va. 315, 319, 512 S.E. 2d 560, 562 (1999).

In *Peninsula Cruise, Inc. v. New River Yacht Sales, Inc., supra*, the court cited *Kolbe* for the proposition that "it is manifest

that the purpose of Virginia's long arm statute is to assert jurisdiction over non- residents who engage in some purposeful activity in this state to the extent permissible under the due process clause." The court applied the due process part of the two-part Virginia test, citing *International Shoe v. Washington* 326 U.S. 310, 316 (1945), and *Burger King, supra,* for the requirement that maintenance of an action against a defendant may not offend "traditional notions of fair play and substantial justice." 257 Va. at 319. The circumstances of each case must be examined to ascertain whether the requisite minimum contacts are present. *Id.*, citing *Kulko v. California,* 436 U.S. 84, 92 (1978), and *Witt v. Reynolds Metals Co.*, 240 Va. 452, 454, 397 S.E.2d 873, 875 (1990).

The Virginia court upheld a finding of jurisdiction in the *Peninsula Cruise* case over a Florida corporation that had contracted to repair a boat in Florida and deliver the boat to a point in South Carolina. However, defendant's employees, for additional consideration, then agreed to deliver the vessel in Virginia and did so. The repair work was done in Virginia. The Virginia Supreme Court concluded that the defendant, by taking these actions, purposefully availed itself of the privilege of conducting business within Virginia, thereby invoking the benefits and protections of Virginia's laws and, consequently, maintenance of the action in Virginia did not offend traditional notions of fair play and substantial justice. *Id.* at 321.

Thus, Petitioners' contention that under *Kessler v. Fauquier National Bank,* 195 Va. 1095, 81 S.E. 2d 442 (1954) (Petition, p. 6 n.2), Virginia might well refuse to enforce a California judgment arising out of a dispute between the parties in this case, is both erroneous and specious. Under Virginia's own law, personal jurisdiction may be challenged at any time in any forum. *Slaughter v. Commonwealth of Virginia, supra,* 222 Va. at 787, 284 S.E. 2d at 827. It is precisely because the Yus did not challenge jurisdiction in the Virginia courts that the subsequent California determination is entitled to full faith and credit everywhere, including in Virginia.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: September 24, 1999

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No. 99-341

In The

Supreme Court of the United States

SIGNET BANK/VIRGINIA, a Virginia corporation, CAPITAL ONE BANK, a Virginia corporation, and DOES 2-100,

Petitioners,

vs.

WILLIAM YU and DARLENE YU, individually and on behalf of others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California First Appellate District

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INTRODUCTION

Respondents' opposing brief is primarily an attack on this Court's jurisdiction.[1] Respondents argue that the court of appeal's judgment cannot be "final" within the meaning of 28 U.S.C. § 1257 because the case was remanded for further proceedings after the constitutional questions were decided. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-486 (1975), however, this Court described four non-exclusive categories of cases which are deemed final for the purpose of section 1257, even though further proceedings in lower state courts remained when *certiorari* was sought.[2] The Court explained:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc. v. Johnson*, [326

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[1] Petitioners did not receive Respondents' Brief in Opposition until October 1, 1999.

[2] Although Respondents repeatedly refer to the four categories of cases described in *Cox Broadcasting* as "exceptions" to the requirement of finality, *see* Opposition at 8, those classes are properly described "as situations in which [this Court] finds there to be sufficient finality even though there are further proceedings on the merits of the case in state court." Erwin Chemerinsky, *Federal Jurisdiction*, § 10.4, at 598 (2d ed. 1994). *See also* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, *Supreme Court Practice*, at 94-96 (7th ed. 1993) (discussing "literal and pragmatic concepts of finality").

> U.S. 120, 124 (1945)], as well as precipitate interference with state litigation.

Id. at 477-78.

In the third and fourth *Cox Broadcasting* categories, "the federal issue would be mooted if the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state-court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts." *Id.* at 478-79.

This case falls neatly within the fourth category of *Cox Broadcasting*. Petitioners here might prevail on the merits on nonfederal grounds, thus obviating the need for this Court to review the federal issues presented. Reversal of the court of appeal would preclude further litigation, whereas a refusal to review the matter immediately could lead to the serious erosion of federal policy. *See id.* at 482-83.

I. THIS CASE MEETS THE FINALITY CRITERIA IN THE FOURTH *COX BROADCASTING* CATEGORY.

A. Decisions on the Constitutional Questions Here Have Been Finally Rendered by the Highest Court of a State in which a Decision Could Be Had.

Because Petitioners sought and were denied review by the California Supreme Court (App. at 32), they have met the first prong of the 28 U.S.C. § 1257(a) finality test. *Perry v. Thomas*, 482 U.S. 483, 489 & n7 (1987); *Abood v.*

Detroit Bd. of Educ., 431 U.S. 209, 216 (1977); *cf. California v. Trombetta*, 467 U.S. 479, 484 (1984).

B. Further Proceedings Following the Court of Appeal's Remand Will Not Require the Decision of Additional Federal Questions That Might Later Require Review By This Court.

As Respondents correctly concede, to prevail on their state law claims, Respondents must still carry their burden of convincing the trier of fact that they are entitled to judgment on either of their remaining novel state law claims. Apart from the constitutional questions presented to this Court, Petitioners have asserted only state law defenses to those claims. Immediate review is the best way to avoid " 'the mischief of economic waste and of delayed justice.' " *Cox Broadcasting*, 420 U.S. at 478.

If Petitioners prevail either because Respondents fail to carry their burden of proof or because Petitioners' own state affirmative defenses prevail, this Court's ability to review the constitutional questions presented today will vanish. Petitioners are thus situated similarly to those in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55-56 (1989), in which the Court granted review when defendants could have prevailed on non-federal grounds at their trial, thereby preventing appeal of the constitutionality of the application of state RICO law to obscenity.

If this Court grants *certiorari* and reverses because proper application of the Full Faith and Credit Clause prohibits California from entertaining actions for damages predicated on a collateral attack upon the final and fully executed judgment of Virginia, or if the Court

decides that California consumers are not a protected class entitled to elevated due process protections, this litigation would end because this Court's judgment "would be preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting*, 420 U.S. at 482-83. *See also Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (the California Supreme Court decision was reviewable under the *Cox Broadcasting* fourth category for "reversal of a state-court judgment in this setting will terminate litigation of the merits of this dispute").

C. The Court of Appeal's Decision Erodes Important Federal Policies and Therefore Requires This Court's Review.

For the reasons explicitly stated in the Petition, the decision below significantly erodes full faith and due process principles established by this Court over a period of many decades. *See Cox Broadcasting*, 420 U.S. at 485-86; *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988) (the lower court's "decision [had] important implications for the regulation of federally owned nuclear production facilities" and review of Ohio Supreme Court's decision was thereby final enough although further proceedings were pending in Ohio courts).

This case is procedurally indistinguishable from *Cox Broadcasting* itself in which the Court granted review to decide "whether, consistently with the First and Fourteenth Amendments, a State may extend a cause of action for damages for invasion of privacy." 420 U.S. at 471. Petitioners seek review to determine whether, consistently with the Full Faith and Credit Clause and the

Fourteenth Amendment, California may "extend a cause of action" for abuse of process which requires California courts to collaterally attack a final and fully executed judgment of a Virginia court. In *Cox Broadcasting Corp. v. Cohn*, like the court below, the Georgia court had rejected petitioner's constitutional challenges to state law and remanded the case for trial. 200 S.E. 2d 127, 131, 133 (Ga. 1973). The Court held that the Georgia Supreme Court's judgment was final on the federal issues and subject to review:

> Appellants . . . may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all. Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that [the First and Fourteenth Amendments did not prohibit the action]. . . . On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability . . . , this litigation ends. Given these factors . . . we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.

420 U.S. at 485-86.

Here, as in *Cox Broadcasting*, even if Petitioners should prevail at trial on state law grounds, the court of appeal's decision on federal constitutional grounds will remain effectively unreviewed and unreviewable. *See also, Goodyear Atomic Corp.*, 486 U.S. at 179 ("even if appellant prevails . . . on nonfederal grounds . . . the unreviewed

decision of the Ohio Supreme Court might seriously erode federal policy"). In *Local No. 438 Construction & Laborers' Union v. Curry*, 371 U.S. 542 (1963), this Court heard petitioner's claim that the NLRB had exclusive jurisdiction over the controversy after the Georgia Supreme Court had reversed a trial court's refusal to enter a temporary injunction against picketing. Although further proceedings were pending following the Georgia Supreme Court's remand, this Court asserted its power with respect to "a judgment of the [state] court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power," holding that the judgment satisfied the requisites of section 1257. *Id.* at 548.

The judgment below has the practical finality required to invoke the jurisdiction of this Court pursuant to section 1257. The questions raised are vital to the constitutional strength of the Full Faith and Credit and Due Process Clauses of the Constitution. The issues are ripe, and they merit review now to foster judicial economy and to prevent the loss of review if the case following remand were decided on state grounds only.

WHEREFORE, Petitioners Signet Bank/Virginia and Capital One Bank respectfully pray that this Petition be granted.

Dated: October 8, 1999

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